No. 06-634

IN THE

# Supreme Court of the United States

MAUREEN FASANO,

*Petitioner*,

—v.—

FEDERAL RESERVE BANK OF NEW YORK, RON HENRY, CYNTHIA RAMOS, LEROY HOPE, DOTTIE BOYD, KIM RUSSO, LISA YOUNG and MERTHA JAKUBISZEN,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## PETITIONER'S REPLY TO OPPOSITION BRIEF

### I. THIS CASE SQUARELY PRESENTS THE IMPORTANT QUESTION OF WHETHER THE "DISMISS AT PLEASURE" LANGUAGE IN THE FEDERAL BANK ACTS PREEMPTS STATE EMPLOYMENT LAW

Respondents' Opposition Brief is significant for what it does ***not*** say: respondents do not deny that the Petition presents an important federal question. In the courts below, in fact, respondents sought interlocutory review under 28 U.S.C. § 1292(b), precisely because the case "raises Constitutional issues that will have far-ranging implications and consequences for the entire Federal Reserve System." Brief in Support of Defendants' Motion for Interlocutory Appeal, at 1 (May 21, 2004). The Third Circuit obviously agreed, not only taking the interlocutory appeal, but also publishing its "PRECEDENTIAL" opinion. 1a.

Respondents' express hope is that this ruling "may have an impact on other cases nationwide asserting state law employment discrimination claims against Federal Reserve Banks . . . ." Brief in Support of Defendants' Motion for Interlocutory Appeal, at 14 (May 21, 2004). For this very reason, respondents made a point of involving as Amici Curiae the other eleven Federal Reserve Banks. 8a. One may expect that the Third Circuit's "precedential" opinion will be cited in courts around the nation on motions seeking to dismiss employees' claims asserted under state law.

The employees affected by the decision below, therefore, will number in the thousands. Within the Federal Reserve System alone, there are an estimated 19,069 Federal Reserve Bank employees as of 2006, the last year for which figures are available. See http://www.federalreserve.gov/generalinfo/foia/frbbankbudgets/2006ReserveBankBudgets

.pdf (Table 2). These employees will be impacted by the decision below, regardless of whether they ever assert any employment law claim, because they will be treated differently depending on whether the Bank employer believes they are covered by state law. This could affect their lives in areas as diverse as hiring, on the job harassment, accommodations for disabilities, retaliation or termination. A federal question that potentially affects thousands of employees nationwide warrants the appropriate exercise of this Court's certiorari jurisdiction. See, e.g., Patterson v. Lamb, 329 U.S. 539 (1947) (granting review where the status of thousands of draftees could be affected by the decision below).

And, of course, the decision below will not be limited to Federal Reserve Bank employees. As respondents concede, "virtually identical 'dismiss at pleasure' provisions" are found in the Federal Reserve Act, 12 U.S.C. § 341 (Fifth); the National Bank Act, 12 U.S.C. § 24 (Fifth); and the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a). See Opp. Br., at 11 n.4. As the Third Circuit noted, every federal circuit to interpret the "dismiss at pleasure" language in the Bank Acts has done so consistently for all three statutes. 16a. Therefore, the "nationwide" impact of the decision below will not only affect Federal Reserve Bank employees, but also the officers and/or employees of the Federal Home Loan Banks and the National Banks.

Likewise, respondents do not dispute that the decision below implicates not only the New Jersey laws at issue below, but also the "historic police powers" of all fifty States to prohibit discrimination. DeCanas v. Bica, 424 U.S. 351, 356 (1976). As respondents' concede, the key to the Third Circuit's holding is that any state law that does not "exactly match" federal employment law, is preempted ***in its entirety.*** 11a-12a; 22a; 28a-29a. As we pointed out in our Petition, all fifty states have various laws prohibiting

employment discrimination and retaliation, many of which vary in significant ways from federal law. Petition, at 20-22. The Third Circuit's ruling not only potentially preempts all of these laws for Bank employees, but also would drastically interfere with the "collaborative anti-discrimination scheme" contemplated by federal law. Kroske v. US Bank Corp., 432 F.3d 976, 988-89 (9th Cir. 2005), as amended 2006 U.S. App. LEXIS 3367 (Feb. 13, 2006), cert. denied, 127 S. Ct. 157 (2006); 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(c) and (d). Indeed, respondents' goal is to divest all state agencies of any jurisdiction over claims against them. See 12a. A ruling that potentially preempts such a wide area of state law presents an important federal question for this Court's review. See, e.g., Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 385 (2000) (granting certiorari to review a decision invalidating a state statute restricting political contributions, "[g]iven the large number of States that limit [such] contributions").

Finally, this is a "clean case" that presents an excellent vehicle for determining whether the "dismiss at pleasure" language preempts state employment laws. There are no complicated factual disputes, because respondents' motion to dismiss was made on the pleadings, so the relevant facts for the appeal are based on the complaint, 5a, and are largely immaterial in any event to the pure question of law at issue. The preemption issue was squarely raised and decided in the trial court and in the Third Circuit, and there are no jurisdictional or other obstacles that would prevent this Court from reaching the question presented. Even respondents' faint attempt to defend the Third Circuit's ruling on alternate grounds, in reality, merely seeks a broader ruling, which would preempt all state laws regardless of any variation from federal law. See Opp. Br., at 6-7. Respondents' argument in the alternative does not avoid the conflict among the Circuits, but presents it squarely, by urging the Sixth Circuit's holding that preempts

all state laws regardless of any conflicts. See Arrow v. Federal Reserve Bank of St. Louis, 358 F.3d 392, 393 (6th Cir. 2004). See infra at 5.[1]

This Court has repeatedly granted certiorari to review whether a federal statutory scheme preempts a state employment law claim. See, e.g., English v. General Electric Co., 496 U.S. 72, 78 (1990); California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987). This case is unusual only in that both parties agree the case presents an important question of federal law. Brief in Support of Defendants' Motion for Interlocutory Appeal, at 1 (May 21, 2004) (the case "raises Constitutional issues that will have far-ranging implications and consequences for the entire Federal Reserve System"). This Court should grant certiorari to resolve this important federal question.

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[1] With regard to the merits of this alternate argument, there is no authority to support respondents' contention that the Federal Reserve Banks are analogous to government agencies, and therefore presumptively immune from all state laws. This Court has always held that the Banks are "not departments of the government. They are private corporations in which the government has an interest." United States Shipping Board v. Western Union, 275 U.S. 415, 425-26 (1928). Thus, both the EEOC, and the Federal Reserve Board itself, take the position that the Federal Reserve Banks should be treated as private corporations for purposes of federal anti-discrimination laws. Enforcement Guidance on Coverage of Federal Reserve Banks, at *6, EEOC Decision No. N0915-002 (Oct. 20, 1993) (1993 WL 452695) ("the Federal Reserve Banks are private sector employers and . . . charges and complaints filed pursuant to the ADEA, Title VII and the EPA should be processed under the private sector provisions of those Acts"); 50 Fed. Reg. 18769 (May 2, 1985) (the "Federal Reserve Banks are not government agencies for purposes of the Civil Rights Act"). As for respondents' reliance on McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and its progeny, that case addressed whether a State could directly tax a bank owned by the United States. There is, in fact, a statute that expressly exempts the Banks from state and local taxation. 12 U.S.C. § 531. There is no statute that exempts the Banks from state employment laws.

## II. THERE IS A LONG STANDING, CURRENTLY ACTIVE CONFLICT AMONG THE CIRCUITS, AND AMONG THE STATE COURTS, OVER WHETHER THE "DISMISS AT PLEASURE" LANGUAGE PREEMPTS STATE LAW

Respondents insist, however, that certiorari should be denied because there are supposedly "no circuit or state court conflicts" over the preemptive effect of the "dismiss at pleasure" language. Opp. Br., at 11. Respondents are wrong; indeed, their own statements contradict this claim.

First, there is no dispute that the Third Circuit's decision conflicts with the holding of the Sixth Circuit on this issue. The Sixth Circuit has held, since 1983, that all state employment laws are completely preempted by the "dismiss at pleasure" language found in the Bank Acts. Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928, 929-30 (6th Cir. 1987); Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378, 387 (6th Cir. 1983). Although the Sixth Circuit staked out this position two decades ago, it has reaffirmed its holding as recently as 2004. Arrow v. Federal Reserve Bank of St. Louis, 358 F.3d 392, 393 (6th Cir. 2004).

The Third Circuit refused to follow the holdings in Ana Leon T. and Arrow. 20a-23a. Unlike the Sixth Circuit, the Third Circuit postulated that there would be circumstances where it would not preempt state employment laws against the Banks. 11a-12a. Unless respondents contend that the Third Circuit was being disingenuous, there is no dispute that the Third and Sixth Circuits are in conflict.

The Third Circuit's ruling is also in conflict with the Ninth Circuit's holding in Kroske v. US Bank Corp., 432 F.3d 976, 988-89 (9th Cir. 2005). Respondents insist every Circuit Court has reached the "same result," and has held that the "dismiss at pleasure" language preempts state employment

claims. Opp. Br., at 1, 12, 13. This assertion is manifestly wrong in view of the "result" of Kroske, which held that Washington's Law Against Discrimination, Wash. Rev. Code §§ 49.60.010-400 was ***not preempted*** by what respondents describe as the "virtually identical 'dismiss at pleasure' provision[]," Opp. Br. at 11 n.4, found in the National Bank Act, 12 U.S.C. § 24 (Fifth). Kroske, 432 F.3d at 987.

"A genuine conflict . . . arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Robert L. Stern, et al., Supreme Court Practice 226 (8th ed. 2002). Here, the Third and Ninth Circuits have interpreted "virtually identical" language in two cases, reaching opposite results. The Third Circuit has held that the *NJ*LAD is preempted ***in its entirety***. The Ninth Circuit has held that the *W*LAD is not preempted at all. This is a genuine conflict warranting review. Gutierrez v. Ada, 528 U.S. 250, 254 (2000) (certiorari granted "to review a split between the Ninth Circuit's interpretation of the Organic Act of Guam and the Third Circuit's reading of identical language in the Revised Organic Act of the Virgin Islands").

The conflict here is twofold. First, the Third Circuit held that the state law is preempted whenever is does not "exactly match" federal employment law. 11a-12a; 22a; 28a. By contrast, the Ninth Circuit held that there is no preemption, as long as the state law is "parallel" to federal law, and prohibits the same employment practice. Kroske, 432 F.3d at 988-89. As we pointed out in the Petition (and respondents do not challenge this point), the Ninth Circuit thus upheld the WLAD, even though its requirements and remedies go beyond federal law. See Petition, at 15-16. By contrast, these same variations in state and federal law (e.g., more exp[illegible]sive damages, no need to exhaust administrative remedies, broader statutory reach), were held to be fatal to the state law in the Third Circuit's analysis. See 26a-27a.

Second, the Ninth Circuit emphasized that if there were any genuine conflicts between state and federal law, any preemption would be limited to the actual conflict. Kroske, 432 F.3d at 987-88, 989. By contrast, the Third Circuit held the opposite: any failure to "exactly match" federal law meant the state law was preempted in its entirety. 28a-29a.

Respondents insist the conflicts in these holdings are immaterial, because either approach invariably leads to the "same result." Opp. Br., at 13. Patently that is not true. The state anti-discrimination law was ***not*** preempted in Kroske; the state law ***was*** preempted by the Court below.

A three-way Circuit split would seem sufficient to grant certiorari on a question that admittedly will have "far-ranging implications and consequences for the entire Federal Reserve System." But the situation is even more compelling, because the Third Circuit's decision is also in conflict with the highest courts of two States, which have both upheld state employment claims against preemption challenges based on the "dismiss at pleasure" language. Sargent v. Central National Bank & Trust Co., 809 P.2d 1298, 1303 (Okla. 1991); Peatros v. Bank of America, 990 P.2d 539, 552 & n.6 (Cal. 2000). Respondents dismiss these conflicts, because these cases involved the National Bank Act, not the Federal Reserve Act. That is a curious position, given that respondents admit the "dismiss at pleasure" language in the two statutes is "virtually identical," and given that every court -- including the Court below -- has interpreted the two statutes consistently.[2]

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[2] Respondents complain that we cited to the chaos in the lower courts on whether the "dismiss at pleasure" language preempts state law, arguing that district court conflicts are immaterial. However, as we explained in the Petition, the lower court conflicts "obviously add to the confusion, thus making it proper for counsel to bring such lower court decisions to the Court's attention." Supreme Court Practice, supra, at 238. See, e.g., Heffron v. Int'l Soc'y for Krishna Consc., 452 U.S. 640, 646 n.9 (1981).

The substantial conflicts over the preemptive effect of the "dismiss at pleasure" language have been recognized by courts and commentators alike. Kahn & McCarthy, At-Will Employment in the Banking Industry: Ripe for a Change, 17 Hofstra Lab. & Emp. L. J. 195, 211-12 (1999) ("there is a split among the federal circuits and the state courts concerning whether state employment laws are preempted by the Bank Acts"); Kroske, 432 F.3d at 985 ("[w]e disagree with the Sixth Circuit's summary conclusion that state anti-discrimination statutes . . . are preempted by the banking laws"); Peatros, 990 P.2d at 559 (Brown, J., dissent) ("state and federal courts have variously concluded the 'at pleasure' dismissal provision . . . fully preempts wrongful termination causes of action under state antidiscrimination statutes, partially preempts such claims, or has no preemptive impact whatsoever"). The Court below recognized the existence of the conflict. See, e.g., 7a ("wide split in authority among courts around the country"). Indeed, until now, ***respondents*** agreed "[t]here is a split among the Circuits . . . over the preemptive scope of these 'dismiss at pleasure' provisions." Brief for Appellants, at 33 (Jan. 20, 2006).

These inter-Circuit and Circuit/State conflicts are long standing, active and current. These conflicts began in the 1980s, persisted through the 1990s, and continue unabated to the present day. The most recent conflicts, between the Third and Ninth Circuits, are based not on dicta, but rather on the central holdings for each case, and stem in each instance from a lengthy, published opinion focused on the question presented, which is fully explored in exhausting detail. And this conflict has lead to completely different results on very similar facts. Only this Court can resolve this recurrent conflict over the preemptive effect of the "dismiss at pleasure" language.

## III. THE THIRD CIRCUIT'S HOLDING, THAT ANY STATE LAW THAT DOES NOT "EXACTLY MATCH" FEDERAL EMPLOYMENT LAW IS PREEMPTED IN ITS ENTIRETY, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT

Respondents' effort to reconcile the Third Circuit's decision with this Court's preemption jurisprudence is unavailing. Indeed, it is striking that respondents largely ignore several of this Court's key holdings.

First, the Third Circuit erred in holding that a state law prohibiting discrimination is preempted if it "goes beyond the remedies and protections provided by . . . federal laws." 24a. By contrast, this Court has held "'that' ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law.'" English v. General Electric, 496 U.S. at 89. Respondents urge that these cases are inapposite because "[p]etitioner is not seeking to enforce any federal requirement." Opp. Br., at 10 & n.3. Quite the contrary, the federal statute barring disability discrimination expressly incorporates state laws, including their "remedies, rights, and procedures," even if they "provide[] greater or equal protection" than federal law. 42 U.S.C. § 12201(b).[3]

Second, the Third Circuit improperly held that any purported "conflict" between state and federal law required the state law to be preempted in its entirety. 28a. This Court, by contrast, has consistently held that "state law is displaced only 'to the extent that it actually conflicts with federal

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[3] Respondents treat the ADA's anti-preemption provision as a dead letter, even though this case does not involve any express preemption of state law, insisting that "whether preemption is express or implied, a court must examine Congressional intent." Opp. Br., at 9 n.2. That's true, but here Congress' manifest intent is that state laws are not preempted even if they provide greater protections than federal law.

law.'" Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 476 (1996). In a non-sequitur, respondents argue that federal courts should not "rewrite" state law. As this Court knows, it is not a question of "rewriting" state law, but rather limiting any preemption of state law to the actual conflict. English, 496 U.S. at 88.

Last, the Third Circuit violated this Court's instruction which "enjoins seeking out conflicts between state and federal regulation where none clearly exists." English, 496 U.S. at 89. There is no compelling reason to read the "dismiss at pleasure" language as interfering with the States' historic police power to prohibit discrimination. No conflict warranting any preemption exists, if the language is read to codify the employment at will doctrine, leaving the State's power to regulate unlawful discrimination fully intact. To this, respondents have no answer whatsoever.

## CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

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